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IN THE

Supreme Court of the United States

October Term, 1969
No. ~~730~~ 51

ARCHIE WILLIAM HILL, JR.,
Petitioner,

vs.

STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of California.

RESPONDENT'S BRIEF

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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RESPONDENT'S BRIEF

Questions Presented

1. Was the mistaken arrest of one Miller lawful, where the authorities had probable cause to believe that petitioner Hill had committed a robbery and kidnaping, and further had probable cause to believe that Miller was petitioner Hill?

2. Was the search of petitioner's one-bedroom apartment, as an incident of what the authorities reasonably and in good faith believed to be the lawful arrest of petitioner, reasonable (a) under *United States v. Rabinowitz,* 339 U.S. 56, and *Harris v. United States,* 331 U.S. 145, (b) under *Chimel v. California,* 395 U.S. 752, which disapproved those decisions?

3. Should the rule promulgated in *Chimel v. California,* 395 U.S. 752, to the extent that it announces a departure from previous holdings of this Court, be ap-

plied prospectively only and not to cases in which searches were properly conducted under then-existing law?

Statement of the Proceedings

A. History of the Case

In an information filed by the District Attorney of Los Angeles County, petitioner, together with Alfred Elmo Baum and Richard Joseph Bader, was charged in Counts I and II with robbery, a felony, in violation of California Penal Code section 211. It was further alleged in the information that the three defendants were armed with deadly weapons at the time of the commission of the two robberies. In Count III of the information, petitioner, together with Baum and Bader, was charged with kidnaping for the purpose of robbery, a felony, in violation of California Penal Code section 209. (R. 1-2.)

Petitioner's motion to dismiss the information pursuant to California Penal Code section 995 was denied as to all counts. Petitioner was arraigned and pleaded not guilty to each count. (R. 3.) Petitioner, personally, and all counsel waived trial by jury. (R. 4.)

By stipulation of counsel the cause was submitted on the testimony contained in the transcript of the preliminary hearing, which transcript was received in evidence as an exhibit by reference (R. 8-50), subject to the trial court's rulings, with each side reserving the right to offer additional evidence. It was further stipulated by counsel that all stipulations entered into at the preliminary hearing were deemed entered into at the trial, and that any exhibits received at the preliminary hearing were deemed received in evidence at the trial.

subject to the trial court's rulings. Petitioner personally stipulated to the foregoing procedure and expressly waived his right of confrontation. (R. 5-7.)

The prosecution presented additional testimony before the trial court, but the defense did not offer any evidence. (R. 51-65.) The trial court made certain findings and rulings and then continued the matter for further argument by counsel and review by the court. (R. 65-66.)

On October 20, 1966, the trial court denied petitioner's motion to suppress certain evidence and found petitioner guilty as charged on all counts. A probation report was ordered and the matter continued. (R. 67-68.)

On November 16, 1966, petitioner's motion for new trial was denied, as was his application for probation. The trial court made no disposition of the allegation in the information that petitioner was armed, and the court did not fix the degree of the two robberies.[1] As to each count, petitioner was sentenced to state prison for the term prescribed by law,[2] the sentences being ordered to run concurrently with each other. (R. 69.)

Petitioner filed timely notice of appeal from the judgment of conviction. (R. 70-71.) On appeal the California Court of Appeal, Second Appellate District, Division Three, reversed the judgment in an opinion filed

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[1]The failure of the trial court to determine the degree of these offenses rendered them robbery of the second degree. Cal. Pen. Code § 1157.

[2]California law provides that kidnaping for the purpose of robbery is punishable by imprisonment in state prison for life with possibility of parole where bodily harm is not suffered by the victim. Cal. Pen. Code §209. At the time of the commission of the charged offenses, robbery of the second degree was punishable by imprisonment in state prison for one year to life. Cal. Pen. Code §§ 213, 671.

March 28, 1968, and reported unofficially as *People v. Hill,* 260 A.C.A. 585 (1968) [67 Cal. Rptr. 389]. (R. 72-75.) Respondent's Petition for Hearing was granted by the California Supreme Court, which affirmed the judgment of conviction in an opinion filed November 13, 1968, and reported as *People v. Hill,* 69 Cal. 2d 550 (1968) [446 P.2d 521]. (R. 76-81.) Petitioner's Petition for Rehearing was denied by the California Supreme Court on December 11, 1968. *Supra.* (R. 82.)

On October 13, 1969, this Court granted petitioner's motion for leave to proceed *in forma pauperis* and petition for writ of certiorari, transferring the case to the appellate docket and placing it on the summary calendar. (R. 84.) 90 S.Ct. 112; 24 L. Ed. 2d 68.

B. Factual Statement

On June 4, 1966, Nicholas Georgiade resided with his wife and his mother at 11935 Laurel Hills Road, Studio City, California. He and his mother were watching television at home that evening. At approximately 10:15 or 10:20 p.m., in response to a very light tapping sound on his front door, Mr. Georgiade turned on the porch light, opened the door, and was confronted by four men. Two wore masks, and two were unmasked. Two of the men were armed with guns and two with knives. (R. 10, 23.)

Apparently Mr. Georgiade was told that it was a "stick up." Believing that it might be a joke, he said, " 'You guys must be kidding around.' " He was told, " 'No. We are not fooling around,' " but replied, " 'What is this, some kind of a joke?' " Mr. Georgiade was then hit on the head with a gun. (R. 10-11.) The blow inflicted a laceration which ultimately necessitated

seven stitches. (R. 12.) Mr. Georgiade and his mother were told to lie on the floor. His head was bleeding a great deal. (R. 13, 24.)

Mr. Georgiade's wife heard the noise and conversation and came running out of her bedroom. She was met at her bedroom door by two men, one of whom was masked and was holding a knife over his shoulder. She was frightened, and said, " 'Please don't kill me.' " She was told by one of the men to lie down on the floor to avoid being hurt and was asked, " 'Where is your purse.' " She pointed it out to the man and was given permission to join her husband. (R. 16-17.) She was told to lie down next to him in the front room and was "scared to death." (R. 20, 24-25.)

Mr. Georgiade's mother asked for permission to place her dress on her son's head because of the bleeding. Her hands became "full of blood," and she asked one of the men to get a towel, which he did. (R. 24.)

The following items were taken from Mr. Georgiade: four or five dollars, two cameras, a camera case containing lenses, a flash attachment, and flashbulbs, and a Toshiba radio. (R. 12, 21.) Forty dollars was taken from the purse belonging to Mr. Georgiade's wife. (R. 17, 20.) She later provided Sergeant Albert Gastaldo of the Los Angeles Police Department Robbery Detail with the serial number of one of the two cameras. (R. 20, 36.)

One of the men demanded money from Mr. Georgiade's mother, and she told him that she had ten dollars in her white purse. The man could not find the money inside the purse and demanded that she find it, telling her, " 'Get out and walk slow.' " She walked twenty

or twenty-five feet from the front room to the bedroom and found the ten dollars in a zippered portion of the purse. The man took it and told her, " 'O.K. Go back and lay down.' " (R. 24-26.) She was "shaking all over" and returned to where her son was lying. (R. 25-26.)

One of the men stated, " 'We have got to find more money or we won't leave the house. We should find more money.' " The men searched in all the rooms for more money and then left. (R. 26.)

At approximately 10:30 that evening, Scott Lee Armstrong, a fifteen-year-old boy who lived in the next block, and a friend of his were leaning against a 1965 or 1966 Chevolet Impala. He saw four men run out of Mr. Georgiade's driveway, which was twenty-five feet from the vehicle. One of the men had a gun. Scott began to walk toward the rear of the automobile in order to record the license number, when two of the men began to push him, pointed a gun at him, hit him in the chest with a fist, and ordered him to run down the driveway. When the men left, Scott telephoned the police. (R. 30-35.)

Sergeant Gastaldo, in the company of three other officers, conducted a search of petitioner's apartment two days later, shortly after 8:15 p.m. on June 6, 1966. (R. 56-57.) The sergeant, an officer of eleven years' experience on the police force, gave the following reasons for conducting the search. (R. 52-53.)

Several things led him to believe that petitioner was involved in several robberies in the San Fernando Valley area of Los Angeles, and in particular in the Nicholas Georgiade robbery in Studio City. The following information, apparently furnished to him by the victims

and Scott Armstrong, described the suspects in the Georgiade robbery:

> "It consisted of four male Caucasians in age group from 21 to 26, all ranging in heights from 5-foot-9 to 5-foot-11; the hair on two of them was dark brown in color, the other two were wearing hoods, had a complete description of the weapons, had a description of a vehicle which was seen as the getaway car. . . . Late model Chevrolet, light in color, '65." (R. 53.)

The officer checked out field interrogation cards on file with the police department "which associated [petitioner] Mr. Hill with Mr. Baum and Bader." (R. 38.) The cards indicated "1911 Sepulveda Boulevard, apartment number four, as belonging to Mr. Hill." (R. 38-39, 54.) The cards gave petitioner's birthdate, his business address, and the "circumstances for which the card was made." The cards also described petitioner as "a male Caucasian, either 19 or 20, 5 feet 10 inches, 155, brown [eyes] and brown [hair]." One of the cards described an automobile owned by petitioner as a two-door black 1957 Buick with California license number PZV001, and Sergeant Gastaldo checked further and found that this vehicle had been impounded "in connection with a previous arrest." (R. 44, 54-55.)

A fellow officer, Sergeant Ide of the robbery detail, informed Sergeant Gastaldo that there had been several robberies in the Van Nuys Division in which "the physical descriptions . . . were almost identical" with the Georgiade robbery. He also told Sergeant Gastaldo that he had received some unconfirmed information that petitioner and some other individuals had guns in their possession prior to the commission of the Georgiade

robbery. Sergeant Gastaldo was also informed by Sergeant Ide that Richard Joseph Bader and Alfred Elmo Baum were in custody at the Van Nuys Division on a narcotics charge and that the vehicle which they were driving at the time of their arrest on June 6, 1966 (two days after the Georgiade robbery) was checked and turned out to be the 1957 Buick belonging to petitioner. (R. 36-37, 55.)

Sergeant Ide told Sergeant Gastaldo that some property was removed from petitioner's vehicle at the time of Bader's and Baum's arrest. After checking police records and consulting Mr. Georgiade, Sergeant Gastaldo ascertained that one of the articles removed from petitioner's vehicle was the radio which had been taken from Mr. Georgiade during the course of the robbery. (R. 55-56.)

At 5:30 p.m. on the date Bader and Baum were arrested, Sergeant Gastaldo had a conversation with them after advising them of their constitutional rights.[3] (R. 37, 56.)

From both Bader and Baum, Sergeant Gastaldo:

> ". . . received a full statement as to what occurred at various robberies and who was implicated in them, and that [Sergeant Gastaldo] could go to Mr. Hill's [petitioner's] apartment—they gave [Sergeant Gastaldo] the address again, informed [him] that the guns used in the robbery were there and also that the remaining property should be in [petitioner's] apartment."

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[3]Bader, and presumably Baum, were advised that they had a right to counsel (but not that they had a right to a public defender), that anything they said could be used against them in a criminal proceeding, and that they did not have to talk to the officer unless they wanted to. (R. 37, 56.) *See People v. Hill*, 69 Cal. 2d 550, 551(n. 1) (1969) [446 P.2d 521, 522]. (R. 76.)

Bader and Baum gave an address for petitioner on Sepulveda, and Bader also informed Sergeant Gastaldo "that he [Bader] was sharing that apartment with Mr. Hill [petitioner]." (R. 56.)

At approximately 8:15 p.m. that same day, Sergeant Gastaldo, in civilian attire and in the company of Sergeant Ide and two other sergeants, proceeded to the address given by Bader. The foregoing information known to Sergeant Gastaldo, with the exception of what he had learned from the eyewitnesses, was acquired by him within the preceding six or seven-hour period. The officers verified that Archie Hill (petitioner) lived in Apartment 4, by checking the mailbox for that apartment, on which only petitioner's name appeared, and by making inquiry of a child in the area of the apartment house. The officers then knocked on the door of the apartment. (R. 56-58, 61.) Their guns were not drawn. (R. 43.)

The door was opened by a person "who fit the description exactly of [petitioner] Archie Hill, as [Sergeant Gastaldo] had received it from both the cards and from Baum and Bader." (R. 39, 57.) Sergeant Gastaldo had not previously seen petitioner but "immediately . . . recognized that [the person] closely fit the description of several robberies which we were investigating with this group."[4] (R. 39, 57.)

Prior to arresting the person the officers observed from outside the apartment an automatic firearm lying on a coffee table in plain sight in the front room (the

[4]The only definite disparity between the appearance of petitioner and the person arrested, as reflected by the record, was that petitioner was two inches shorter (5'10" rather than 6'0") and ten pounds lighter. (R. 62.)

living room), with a fully loaded clip lying next to it. (R. 40, 45-46, 59.)

The officers identified themselves. Sergeant Gastaldo could not recall whether the person invited them in. The officers immediately placed the person under arrest for robbery, believing that he was petitioner. They were not armed with an arrest warrant or a search warrant. (R. 43, 57-58.)

The officers then entered the apartment. No one other than the officers and the person under arrest was present inside the apartment, which consisted of a living room and one bedroom, in addition to a bathroom and a kitchen area. (R. 40, 58.)

The officers asked the person whether he was petitioner Hill in order to make sure of the fact. The person replied "that his name was Miller and that he didn't live there, and that he had no knowledge of what was in the apartment; he had never seen any guns; to his knowledge he knew nothing about them." The person was asked how he could not have any knowledge concerning the automatic lying in plain view; he replied, but Sergeant Gastaldo did not recall the response. The person stated "that he didn't know where Archie Hill was; that Archie Hill did in fact own the apartment there, or lived in the apartment, and that he was just sitting around waiting for him; that to his knowledge there was no one else in the apartment but him." The door to the apartment had a lock, but the person stated, in response to Sergeant Gastaldo's question, "that he just came in and was waiting for Mr. Hill." (R. 58-60.)

The person "produced some type of identification which showed him to be Mr. Miller." Sergeant Gas-

taldo did not recall "[e]xactly what it was." (R. 60.) However, the identification "didn't prove anything" to Sergeant Gastaldo. (R. 65.) The trial court took "judicial notice of the fact—that those who are apprehended and are arrested many times attempt to avoid arrest by giving false identification."[5] (R. 66.)

After speaking to the person, the officers searched the apartment incident to the arrest and without the permission of either petitioner or the arrestee. The following objects were seized by the officers: Numerous rent receipts and personal correspondence, in the name of (petitioner) Archie Hill and Dick Bader, were found in a bedroom dresser drawer. (R. 41, 58, 60.) Also found in the bedroom were a starter pistol, two eight-inch switchblade knives, a Fujica 35 automatic camera with a brown case and bearing a serial number, and two hoods bearing two holes and sewn from white T-shirts. (R. 9, 40, 58.) Under a sofa in the front room Sergeant Ide found a .22 caliber revolver. (R. 9, 40.)

Also found in the bedroom dresser drawer were two pages of a diary. (R. 40, 60.) The pages, which were received in evidence as Exhibit 7 (R. 7, 40, 49, 67), read as follows:

> ". . . 'Friday I went out with Gina. Then Saturday night we went out to hold up a market, but when we got there it was closed, so we had to go to a house. We knocked on the door, and when they answered the door we ran in and I had to hit the man

[5]California courts may take judicial notice of facts of common knowledge. Cal. Evid. Code § 452(g). A matter judicially noticed is to be considered by the trier of fact as an established evidentiary fact. Cal. Evid. Code § 457.

on the head with my gun, because he didn't get down on the floor fast enough. We only got about $60 from them. We left from there and went to TJ and scored seven keys. On the way back we pulled over at the roadblock, but they only checked the trunk of the car. We got back home about 6:00 in the morning. I went to bed. Then Dick and one of the guys that made this run with us left my apartment with Dick to go and get something to eat. This turned out to be a mistake, because they got busted for possession of grass.' " (R. 41.)

It was stipulated by the prosecution and defense counsel that the handwriting on the diary pages was made by the same person who filled out a certain Los Angeles Police Department exemplar card, and that the exemplar card was filled out by petitioner. (R. 47.)

The person arrested was brought to the police station and booked. (R. 61, 65.) Sergeant Gastaldo thoroughly checked out the question of the man's identity, and only a day and a half later did he become aware that the arrestee was in fact named Miller and was not petitioner. (R. 64.) Apparently Miller was then released, the police having no reason to detain him. (R. 63.) At 11 p.m. on the day following Miller's arrest, the fourth participant in the Georgiade robbery, one Baca, was arrested by Sergeant Gastaldo. (R. 36, 41-42.)

At the preliminary hearing Mr. Georgiade could not identify any of the four robbers positively but found Baum to be similar to one of the robbers who was not wearing a hood. (R. 11-12.) The robbers were at the Georgiade residence for twenty-five or thirty minutes

but after the first thirty seconds or minute of their presence, they prevented Mr. Georgiade from looking at their faces. (R. 15.)

Mr. Georgiade's wife positively identified Baum as one of the robbers and identified Bader as looking "very much like" one of the masked men on the basis of her observation of his eyes and nose, which were visible. (R. 18-19.) However, she could not identify the other two robbers. (R. 21.)

Mr. Georgiade's mother was unable to identify any of the robbers because she was too frightened to look directly at them. (R. 24, 27.) However, they appeared young to her, approximately twenty years of age. (R. 28.)

Scott Armstrong identified Bader and Baum as two of the four robbers who fled in the automobile which was parked outside the Georgiade residence. (R. 31-32.) They had come close to him when they hit him and told him to "get moving." (R. 35.) The moon was out, and it was an "extremely bright night." (R. 33.)

Mr. Georgiade was able to identify the .22 caliber revolver taken from underneath the sofa in petitioner's living room as the same type, model, color, and handle as the gun with which he was struck during the course of the robbery. (R. 11.) His wife, as well as Scott Armstrong, also identified the weapon as similar to one used on that occasion. (R. 18, 32.)

Mr. Georgiade and his wife identified the starter pistol found in petitioner's bedroom as the firearm carried by one of the other robbers. (R. 11, 19.)

Mr. Georgiade's wife identified the two switchblade knives and the two hoods found in petitioner's

apartment as similar to those used in the robbery. (R. 18-19, 22.)

Mr. Georgiade and his wife also identified the camera recovered from petitioner's apartment as the one taken from them during the robbery, and Mr. Georgiade identified the radio recovered from petitioner's automobile at the time of Bader's and Baum's arrest as the radio taken by the robbers. (R. 13, 20.)

No evidence was offered in defense either at the preliminary hearing or at the trial. (R. 65.)

Summary of Argument

The arresting officers clearly had probable cause to arrest petitioner and reasonably and in good faith believed that it was petitioner, rather than one Miller, whom in fact they were arresting at petitioner's apartment. The person who answered their knock "fit the description exactly" of petitioner. (R. 39, 57.) From the entrance to the apartment the officers observed an automatic firearm lying on a coffee table in plain sight with a fully loaded clip lying next to it. Nevertheless Miller denied having seen any guns in the apartment. (R. 40, 45-46, 58-59.) Miller, who was the only person present inside the apartment, denied being petitioner but indicated total ignorance of petitioner's whereabouts, stating that he was "just sitting around waiting for [petitioner]." Although the door to the apartment had a lock, Miller was unable to give any satisfactory explanation for his presence. (R. 58-60.) Not surprisingly, Miller's identification, bearing a name other than petitioner's, "didn't prove anything" to the arresting officers. The trial court took judicial notice, as it properly could under California law, of the com-

monly known fact "that those who are apprehended and are arrested many times attempt to avoid arrest by giving false identification." (R. 60, 65-66.) The officers' reasonable and good faith belief that they were arresting petitioner is borne out by the fact that Miller was not immediately released but instead was booked and released only after the matter of his identification had been checked out thoroughly for a day and a half. (R. 63-65.)

The arrest was lawful in light of the circumstances which confronted the officers. Probable cause is not a technical concept; it involves the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Brinegar v. United States, 338 U.S. 160, 175.

The objective of the search of petitioner's apartment incident to the mistaken arrest of Miller was reasonable—to seize the weapons and stolen property connected with the robbery for which the arrest was being made. The officers looked only in places where such items might be located. That they unexpectedly happened to come across a diary written by petitioner which inculpated him in the robbery did not preclude use of the diary in evidence. The manner of conducting the search was in all respects reasonable, and the scope of the search was unexceptional under pre-*Chimel* law.

This search was not rendered "unreasonable" in a constitutional sense by the fact that the arrestee, contrary to the reasonable belief of the arresting officers, exercised dominion and control over the one-bedroom apartment *in only a physicial and not a proprietary sense.*

Respondent submits that the California Supreme Court was correct in refusing to infuse into the Fourth Amendment's formulation of reasonableness the inapposite concepts of the law of property.

Desist v. United States, 394 U.S. 244, 248;
Warden v. Hayden, 387 U.S. 294, 304-06;
Jones v. United States, 362 U.S. 257, 266.

Respondent's inability after extensive research to find a single reported decision from any federal or state court passing on the precise question here involved is indicative of the fact that upholding the present search of petitioner's one-bedroom apartment incident to the valid but mistaken arrest of Miller is unlikely to open up a Pandora's box for that minority of law enforcement officers who are unscrupulous. This is particularly so in view of the severely restricted scope of search incident to arrest permissible now under *Chimel.* Moreover, the peculiar circumstances which gave rise to, and legitimatized, the present search are unlikely to recur with any frequency. "[W]e should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable." *Harris v. United States,* 331 U.S. 145, 155. The officers' mistake in no way affected the apparent ability of Miller, who suspiciously denied knowledge of a loaded firearm which was visible in his immediate vicinity, to arm himself or dispose of evidence.

Even under *Chimel,* however, the present search was lawful, since that decision recognizes that there are exigent circumstances which may permit a search of broader scope than normally permitted in the absence of a search warrant. The arrest and search were made less

than 48 hours after the commission of the offense and apparently only a couple of hours after the officers acquired probable cause for the arrest, at which time it was after regular court hours. Petitioner and another member of the robbery gang, armed and dangerous men, were at large and could well be engaged in committing other assaults and robberies. Secondly, the officers could reasonably believe that the arrest of two members of the gang might alert petitioner to flee from his apartment and possibly from the jurisdiction. Finally, if petitioner were arrested that evening and the search delayed until the next day when a search warrant could be procured, the fourth member of the gang, perhaps alerted by petitioner's (and the other two men's) arrests and realizing that the arresting officers might have observed incriminating evidence while arresting petitioner, might remove the weapons, the disguises, and the stolen property from petitioner's apartment—particularly since the officers had information that all the weapons and all the remaining stolen property were kept at petitioner's apartment.

See Warden v. Hayden, 387 U.S. 294, 298-99.

In any event, the new rule announced in *Chimel,* invalidating procedures expressly sanctioned by several decisions of this Court, should be applied only to cases in which the search took place after the date of that decision.

Each of the fundamental criteria guiding resolution of the question whether a new rule of constitutional law affecting criminal procedure should be applied retroactively support limiting the application of the new rule announced in *Chimel* to cases in which the search took

place after the date of that decision, June 23, 1969: (1) the purpose to be served by the new standards, (2) the extent of reliance by law enforcement on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new rules.

Desist v. United States, 394 U.S. 244, 249.

The purpose of deterring improper searches by the police would not be served by applying the new rule retroactively to cases in which the search was conducted in reliance on then-existing law as defined by this Court's decisions. The new rule has no bearing on the issue of guilt or on the fairness of petitioner's trial. Finally, the necessity of retrying the multitude of pending cases in which convictions were obtained in reliance on the *Rabinowitz* and *Harris* decisions could well bring the machinery of justice to a halt in populous counties.

ARGUMENT

I

The Authorities Having Probable Cause to Arrest Petitioner, the Mistaken Arrest of a Person, Whom They Had Probable Cause to Believe Was Petitioner, Was Lawful

Petitioner's claim of error is based entirely on the admission in evidence, over his objection (R. 68), of certain weapons, implements of disguise, items of stolen property, and a diary connected with the robbery and kidnaping of which he was convicted. Petitioner contends that these items were obtained from his apartment as the result of a search and seizure conducted in purported violation of the Fourth and Fourteenth Amendments to the Constitution. Inasmuch as the officers who conducted the search had not procured a search warrant (R. 43), the validity of the search and seizure depends initially upon the legality of the arrest of one Miller at petitioner's apartment and secondly upon whether the ensuing search and seizure was a reasonable incident of that arrest.

The legality of Miller's arrest, which is not directly disputed by petitioner, was upheld by the trial court (R. 67), the California Court of Appeal (R. 74; *People v. Hill*, 260 A.C.A. 585 (1968) [67 Cal. Rptr. 389]), and the California Supreme Court (R. 78-79; *People v. Hill*, 69 Cal. 2d 550 (1968) [446 P.2d 521]).

In *Ker v. California*, 374 U.S. 23, eight members of this Court agreed that the decision in *Mapp v. Ohio*, 367 U.S. 643, rendering the exclusionary rule applicable in state criminal proceedings,

> ". . . established no assumption by this Court of supervisory authority over state courts [citation]

and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law. . . . Mapp did not attempt the impossible task of laying down a 'fixed formula' for the application in specific cases of the constitutional prohibition against unreasonable searches and seizures; it recognized that we would be 'met with "recurring questions of the reasonableness of searches" ' and that, 'at any rate, "[r]easonableness is in the first instance for the [trial court] . . . to determine," ' . . . thus indicating that the usual weight be given to findings of trial courts."

Ker v. California, 374 U.S. 23, 31-32.

". . . The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures. . . . Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques."

Ker v. California, 374 U.S. 23, 34.

See also Sibron v. New York, 392 U.S. 40, 60-61.

Sergeant Gastaldo of the Los Angeles Police Department was one of the investigating officers in the Georgiade robbery. He was assigned to the Robbery

Detail and had eleven years' experience with the police force. (R. 36, 52.) During the six or seven hours preceding his participation in the arrest and search in question, he acquired the following information constituting probable cause to believe that *petitioner* was one of the armed men who had committed the robbery and kidnaping. (R. 52-53, 61.) (The officer did not obtain an arrest warrant. (R. 43.))

1. The radio taken from the Georgiade residence was found in an automobile belonging to petitioner. This occurred when two men, Baum and Bader, were arrested in the vehicle on a narcotics charge two days after the robbery. (R. 36-37, 55-56.)

2. Field interrogation cards on file with the police department associated petitioner with Baum and Bader. The cards indicated 1911 Sepulveda Boulevard, Apartment 4, as petitioner's address, and described petitioner as a male Caucasian nineteen or twenty years of age, 5'10" in height, 155 pounds in weight, with brown eyes and brown hair. (R. 38-39, 54.) This closely approximated the victims' description of the robbers as four male Caucasians, twenty-one to twenty-six years of age, ranging in height from 5'9" to 5'11", the two men who were not wearing hoods having brown hair. (R. 53.)

3. The field interrogation cards described an automobile owned by petitioner as a two-door black 1957 Buick with California license number PZV001. Sergeant Gastaldo's investigation disclosed that this vehicle, which was the one in which Baum and Bader were riding at the time of their arrest, had been impounded "in connection with a previous arrest." (R. 44, 54-55.)

4. A fellow officer in the robbery detail, Sergeant Ide, informed Sergeant Gastaldo that there had been

several robberies in a nearby area in which "the physical descriptions . . . were almost identical" with the Georgiade robbery. He also told Sergeant Gastaldo that he had received some unconfirmed information that petitioner and some other individuals had guns in their possession prior to the commission of the Georgiade robbery. (R. 55.)

5. Shortly after their arrest, and on the evening of the same day, Baum and Bader informed Sergeant Gastaldo as to "what occurred at various robberies and who was implicated in them," told the officer that he "could go" to petitioner's apartment on Sepulveda, and stated that "the guns used in the robbery" and "the remaining property" should be at petitioner's apartment. Bader informed Sergeant Gastaldo that he (Bader) was sharing the apartment with petitioner.[6] (R. 56.)

In addition to their relevance on the issue of probable cause, Bader's words arguably would be sufficient to justify this Court in upholding the validity of the search on the basis of Bader's consent. This is so despite the conclusion of the California Supreme Court to the contrary.[7] *See, e.g., Stroble v. California,* 343 U.S. 181,

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[6]The California Supreme Court held, "Baum and Bader were properly warned of their Dorado rights [*People v. Dorado,* 62 Cal. 2d 338 (1965) [398 P.2d 361], *cert. denied,* 381 U.S. 937], but they were not also informed that counsel would be appointed if they were indigent. Their confessions were therefore inadmissible as to their guilt. (Miranda v. Arizona, 384 U.S. 436; see C.T. 47-58.) Because the confessions did not violate *defendant's* rights, however, they were admissible *on the issue of probable cause for his arrest.* (People v. Varnum, 66 Cal. 2d 808, 813.)" (Emphasis added.) (R. 76; *People v. Hill,* 69 Cal. 2d 550, 551(n. 1) (1969) [446 P.2d 521, 522]).

[7]The California Supreme Court held, "Bader told Gastaldo that he could go to the apartment to search. Even if failure to properly advise Bader of his Miranda rights did not vitiate the consent (see People v. Smith, 63 Cal. 2d 779, 798-799), the

189-90. Bader was in fact a cotenant of the apartment (R. 58), having actual as well as apparent authority to consent to the search of the apartment, and there is nothing in the record to indicate that his consent was involuntary or in submission to authority or unlawful conduct. In the absence of a contemporary objection to the search by a cotenant, the circumstance of being in custody does not incapacitate a person from giving effective consent to the search of his residence.

Davis v. United States, 328 U.S. 582, 593-94;
United States v. Mitchell, 322 U.S. 65, 69-70;
People v. Smith, 63 Cal. 2d 779, 798-99 (1966) [409 P.2d 222, 235-36], *cert. denied,* 388 U.S. 913;
People v. Terry, 57 Cal. 2d 538, 558-59 (1962) [370 P.2d 985, 997], *cert. denied,* 375 U.S. 960.

6. Upon arriving at the address given by Bader, the officers verified that petitioner lived in Apartment 4 by checking the mailbox for that apartment, on which only petitioner's name appeared, and by making inquiry of a child in the area of the apartment house. (R. 56-57.)

Clearly then, the evidence constituting probable cause for *petitioner's* arrest met the tests of being within the arresting officer's knowledge or being based

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subsequent search could not be justified on the basis of the consent because the facts surrounding it—whether it was not a mere submission to authority, not bound up with unlawful conduct—were never developed (see People v. Henry, 65 Cal.2d 842, 846), and Bader's consent does not preclude a challenge to the admissibility of the evidence found in the apartment (see Witkin, Cal. Evidence, § 76, pp. 72-73)." (R. 76-77; *People v. Hill,* 69 Cal. 2d 550, 551(n.2) (1969) [446 P.2d 521, 522]).

upon reasonably trustworthy information, and being sufficient in itself to warrant a man of reasonable caution in the belief that petitioner had committed the offense of robbing the Georgiades.

Ker v. California, 374 U.S. 23, 34-35;
Brinegar v. United States, 338 U.S. 160, 175-76.

The question which must next be resolved is whether this information, in conjunction with the circumstances which follow, gave the officers probable cause to believe that the person who was in fact arrested, one Miller, was petitioner, this justifying the arrest incident to which petitioner's apartment was searched.

Respondent submits that the following facts, apparent to the arresting officers, gave them probable cause to believe that Miller was the man whom they had probable cause to arrest for the Georgiade robbery.

1. Upon knocking at the door of petitioner's apartment, the officers were confronted by a person (Miller) "who fit the description exactly of [petitioner] Archie Hill, as [Sergeant Gastaldo] had received it from both the cards and from Baum and Bader." (R. 39, 57.) Sergeant Gastaldo had not previously seen petitioner but "immediately . . . recognized that [the person] closely fit the description of several robberies which we were investigating with this group." (R. 39, 57.)

The only definite disparity between the appearance of Miller and petitioner, as reflected by the record, was that petitioner was two inches shorter (5'10" rather than 6'0") and ten pounds lighter. (R. 62.) Clearly these discrepancies were negligible and were not even necessarily apparent to the officers.

See Draper v. United States, 358 U.S. 307, 312-13;

People v. Sandoval, 65 Cal. 2d 303, 310 (1966) [419 P.2d 187, 191], *cert. denied,* 386 U.S. 948.

Cf. Rios v. United States, 364 U.S. 253, 255-56;

United States v. Di Re, 332 U.S. 581, 587, 592-95.

2. From outside the apartment the officers observed an automatic firearm lying on a coffee table in plain sight with a fully loaded clip lying next to it. (R. 40, 45-46, 59.) This corroborated the information which Sergeant Gastaldo had received earlier from Sergeant Ide and Baum and Bader, to the effect that petitioner was armed. (R. 55-56.)

3. Miller told the officers that he had never seen any guns in the apartment, despite the fact that the automatic was in plain view on the coffee table. (R. 58-59.) This suspicious conduct reinforced the officers' belief that the man was petitioner attempting to evade arrest and search.

4. Miller furthermore was the only person present inside the suspect apartment. *See Warden v. Hayden,* 387 U.S. 294, 298; *Stephens v. United States,* 271 F.2d 832, 834 (D.C. Cir. 1959). Although he denied being petitioner, he aroused further suspicion by indicating his total ignorance as to petitioner's whereabouts, stating that no one else was present and that he was "just sitting around waiting for [petitioner]." Although the door to the apartment had a lock, Miller apparently was unable to give any satisfactory explanation for his presence. (R. 58-60.)

5. Not surprisingly, Miller's identification, bearing a name other than petitioner's, "didn't prove anything" to Sergeant Gastaldo. (R. 60, 65.) The trial court took judicial notice, as it properly could under California law (Cal. Evid. Code §§ 452(g), 457), of the commonly known fact "that those who are apprehended and are arrested may times attempt to avoid arrest by giving false identification." (R. 66.)

From the foregoing, it is apparent that Sergeant Gastaldo entertained a reasonable and good faith belief that the person he was arresting was in fact petitioner. This is borne out by the fact that Miller was not released immediately following completion of the search, but instead was booked and then released only after Sergeant Gastaldo had thoroughly checked out Miller's identification for a day and a half. (R. 63-65.) As to the arrestee's being booked under the name Miller (R. 65), this reflects only what was noted by the trial court—"the officer was not responsible for the booking procedures which would book the defendant under the name which he gave." (R. 67.)

The reasonableness of Sergeant Gastaldo's belief that he was arresting petitioner must be judged in light of the circumstances which immediately confronted the officer as he opened the door, not in a vacuum of legal theory shaped by three and a half years' hindsight. "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

Brinegar v. United States, 338 U.S. 160, 175.

In light of these principles, it is submitted that the California Supreme Court correctly concluded:

> "When the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." (R. 79.)
>
> *People v. Hill*, 69 Cal. 2d 550, 553 (1968) [446 P.2d 521, 523].

This principle, which is given implicit recognition in the provision in California Penal Code section 836 authorizing an arrest without a warrant whenever the officer "has reasonable cause to believe that the person to be arrested has committed a felony, whether or not a felony has in fact been committed," has been fashioned as a workable rule of state law consistent with the Fourth and Fourteenth Amendments' mandate of reasonableness.

II

The Search of a One-Bedroom Apartment Rented by Petitioner, Incident to the Arrest of Another Person Whom the Authorities Reasonably and in Good Faith Believed to Be Petitioner, Was Reasonable Under Pre-Chimel Law and Also Under Chimel

A. The Objectives and the Scope of the Search Made It Lawful Under Then-Existing Law

The search of petitioner's apartment, incident to the mistaken arrest of Miller at the apartment, immediately followed the arrest. The manner of conducting the search was reasonable, as was the objective of the search, which appears to have been to seize weapons, implements of disguise, and stolen property connected with the of-

fense for which the arrest was made. The record does not support petitioner's argument that the officers searched for evidence which would clarify whether Miller was in fact petitioner, and that therefore they did not in good faith believe that Miller was petitioner when they arrested Miller. The record does not indicate that the officers searched in any place where weapons or stolen property would not be located. That they unexpectedly uncovered the diary in the process of such a search did not preclude use of the diary in evidence.

Abel v. United States, 362 U.S. 217, 238.

A subsidiary point made by petitioner, which is improperly presented before this Court in view of the fact that the question was not raised or decided in any of the state courts and further was not specified as error in the Petition for Writ of Certiorari,[8] is that the diary pages were not subject to seizure and use in evidence because of their self-incriminatory nature as documents prepared by petitioner. However, it has long been settled that:

> "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized."
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> *Gouled v. United States,* 255 U.S. 298, 309.
>
> *See also Abel v. United States,* 362 U.S. 217, 238-40.

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[8]*See Cardinale v. Louisiana,* 394 U.S. 437, 438; *Henry v. Mississippi,* 379 U.S. 443, 450; *Fay v. Noia,* 372 U.S. 391, 438-39; *Irvine v. California,* 347 U.S. 128, 129-30; Rule 40(1)(d)(2), Rules of the Supreme Court of the United States.

Since the rejection in *Warden v. Hayden,* 387 U.S. 294, 300-01, 307-08, of the "mere evidence" rule, documentary evidence does not appear to be accorded any greater protection against invasion of privacy than any other forms of evidence. *See also People v. Thayer,* 63 Cal. 2d 635 (1965) [408 P.2d 108], *cert. denied,* 384 U.S. 908.

Assuming a valid arrest, the only substantial question involved in judging the legality of the search is whether the scope of the search exceeded permissible bounds so as to render it unreasonable in the absence of a search warrant.

At the time of the search in question (June 6, 1966), as well as at the time the search was upheld by the California Supreme Court, the applicable law, as unequivocally established by this Court's decisions, was that "searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required."

> *United States v. Rabinowitz,* 339 U.S. 56, 65-66. *See also Cooper v. California,* 386 U.S. 58, 62; *Harris v. United States,* 331 U.S. 145, 150-52.

Application of that rule authorized the warrantless search incident to arrest in *Rabinowitz, supra,* a one and a half hour search which encompassed the desk, safe, and file cabinets in a one-room office. *Supra* at 58-59. A much more intensive search, lasting five hours and encompassing the defendant's entire four-bedroom apartment, was upheld in *Harris. Supra* at 149, 152. *See also Abel v. United States,* 362 U.S. 217, 237.

The scope of the present search is unexceptional in the context of the law which, prior to the decision in

Chimel v. California, 395 U.S. 752, governed the admissibility in state proceedings of evidence which was obtained as a result of a search and seizure conducted by law enforcement officers. With the exception of the revolver discovered under the living room sofa, all of the seized items (consisting of weapons, hoods, the stolen camera, the diary, rent receipts and unspecified correspondence which was not used in evidence) were discovered inside a dresser drawer in the sole bedroom of the apartment. (R. 9, 40-41, 58, 60.) The manner in which the search of the apartment was conducted was no different in any respect from the manner in which it would have been conducted had the officers not been mistaken and the arrestee in fact been petitioner.

Was this search, which was of permissible objective and scope under then-existing law as an incident of a clearly valid arrest, rendered somehow "unreasonable" in a constitutional sense by the fact that the arrestee, contrary to the reasonable belief of the arresting officers, exercised dominion and control over the one-bedroom apartment *in only a physical and not a proprietary sense*?

This was precisely the position taken by the California Court of Appeal in reversing petitioner's conviction (R. 74-75; *People v. Hill,* 260 A.C.A. 585, 587-88 (1968) [67 Cal. Rptr. 389, 391]) and repudiated by the California Supreme Court in affirming petitioner's conviction. (R. 78-81; *People v. Hill,* 69 Cal. 2d 550, 553-55 (1968) [446 P.2d 521, 523-25].)

Respondent submits that the California Supreme Court was correct in refusing to infuse into the Fourth Amendment's formulation of reasonableness the inapposite concepts of the law of property. Only last Term

this Court, quoting from *Silverman v. United States,* 365 U.S. 505, 511, again "cautioned that the scope of the Fourth Amendment could not be ascertained by resort to the 'ancient niceties of tort or real property law.'" *Desist v. United States,* 394 U.S. 244, 248. And Justice Frankfurter, writing for the court in *Jones v. United States,* 362 U.S. 257, stated in the context of the problem of standing:

> ". . . . We are persuaded, however, that it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . . Distinctions such as those between 'lessee,' 'licensee,' 'invitee' and 'guest,' often only of gossamer strength, ought not to be determinative in fashioning procedures ultimately referable to constitutional safeguards." *Supra* at 266.
>
> *See also Warden v. Hayden,* 387 U.S. 294, 304-06.

The court in *Stoner v. California,* 376 U.S. 483, in the context of the question of a consent to search, held that "the rights protected by the Fourth Amendment are not to be eroded by strained applications of the law of agency or by *unrealistic* doctrines of 'apparent authority'" (emphasis added), *supra* at 488, but at the same time implied that a reasonable basis for a conclusion of apparent authority could validate a search conducted in reliance thereon. *Supra* at 489.

The long-standing principle that the legality of searches depends upon their overall reasonableness rather than on any fixed criteria such as the doctrines of the law of property was reaffirmed in *Chimel*:

> "Thus, although '[t]he recurring questions of the reasonableness of searches' depend upon 'the facts and circumstances—the total atmosphere of the case' [quoting *Rabinowitz,* 339 U.S. at 63, 66] those facts and circumstances must be viewed in the light of established Fourth Amendment principles."
>
> *Chimel v. California,* 395 U.S. 752, 765.

It has always been an established Fourth Amendment principle that the lawfulness of the conduct of an arresting officer is judged by the probabilities facing him at the moment in question—"the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States,* 338 U.S. 160, 175.

Of course, as the Court noted in *Beck v. Ohio,* 379 U.S. 89, 97, "subjective good faith alone [is not] the test" under the Fourth Amendment. The California Supreme Court distinguished *Beck,* where "the police acted without probable cause and only debatably in good faith in arresting and searching the petitioner;" upholding the present arrest and search, the Court added: "No one disputes that good faith is not a substitute for probable cause." (R. 80; *People v. Hill,* 69 Cal. 2d 550, 555 (n.5) (1968) [446 P.2d 521, 524].)

Respondent's inability after extensive research to find a single reported decision from any federal or state court passing on the precise question here involved is

indicative of the fact that upholding the present search of petitioner's one-bedroom apartment incident to the valid but mistaken arrest of Miller is unlikely to open up a Pandora's box for that minority of law enforcement officers who are unscrupulous. This is particularly so in view of the severely restricted scope of search incident to arrest permissible now under *Chimel v. California,* 395 U.S. 752. Moreover, the peculiar circumstances which gave rise to, and legitimatized, the present arrest and search are unlikely to recur with any frequency. "[W]e should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable." *Harris v. United States,* 331 U.S. 145, 155. *See also Beauharnais v. Illinois,* 343 U.S. 250, 263. "When an article subject to lawful seizure properly comes into an officer's possession in the course of a lawful search it would be entirely without reason to say that he must return it because it was not one of the things it was his business to look for." *Abel v. United States,* 362 U.S. 217, 238.

Since the arrest of Miller, whom the officers reasonably and in good faith believed to be petitioner and as such a resident of the one-bedroom apartment, was clearly valid, the officers had the right to conduct a search of permissible scope incident to the arrest. Their mistake in no way affected the apparent ability of Miller, who suspiciously denied knowledge of a loaded firearm which was visible from the entrance to the apartment (R. 45, 58-59), to arm himself or dispose of evidence.[9]

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[9]A contrary holding might mean that an apprehended suspect, in order to foil an arrest-based search, would have only to deny his identity and perhaps produce false identification. Unless the arresting officer personally knew the suspect, the of-

(This footnote is continued on the next page)

Respondent submits that the search of petitioner's apartment was reasonable under then-existing law.[10]

B. The Search Was Lawful Under Chimel, There Being No Opportunity to Obtain a Search Warrant Since the Arrest Took Place After Court Hours and Time Was of the Essence

It is respondent's position that the validity of the present search is governed by the then-existing law, and that the new rules established by this Court's decision in *Chimel v. California,* 395 U.S. 752, apply only to searches conducted after the date of that decision. (*See* Argument III herein.) However, in the alternative respondent submits that the present search and seizure passes muster even under *Chimel.*

The *Chimel* decision holds that as a *general* rule a search incident to arrest is unlawful, and its fruits therefore inadmissible, if the search has extended beyond the person of the arrestee and his reach. In effect the Court imposed a requirement that, "in the absence of well-recognized exceptions", searches of premises must be pursuant to the advance judicial authorization of a search warrant. *Chimel v. California,* 395 U.S. 752, 762-63.

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ficer might feel constrained, particularly in light of the possibility of exposure to civil liability, not to search until absolute verification of the suspect's identity was obtained, or a search warrant obtained, by which time any evidence on the premises might well have been disposed of.

[10]"Indeed, since the Fourth Amendment prohibits only *unreasonable* searches and seizures, it could be argued that there was, in fact, no Fourth Amendment violation in the present case. The law enforcement officers could certainly be said to have been acting 'reasonably' in measuring their conduct by the relevant Fourth Amendment decisions of this Court. [Citing cases.]" (Emphasis by the Court.) *Desist v. United States,* 394 U.S. 244, 254 (n.23).

It is clear from the Court's opinion that it was not intended to bar warrantless searches of premises under all circumstances, and certainly not where it was impracticable to obtain a search warrant.

The Court quoted with approval the following language from *Trupiano v. United States,* 334 U.S. 699, 705, 708:

> " 'It is a cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants *wherever reasonably practicable. . . .*
>
> " 'A search or seizure without a warrant as an incident to a lawful arrest . . . grows out of the *inherent necessities of the situation at the time of the arrest.* But there must be something more in the way of necessity than merely a lawful arrest.' " (Emphasis added.)
>
> *Chimel v. California,* 395 U.S. 752, 758-59.

Quoting from *McDonald v. United States,* 335 U.S. 451, 456, the Court stated:

> " '. . . We cannot . . . excuse the absence of a search warrant *without a showing . . . that the exigencies of the situation made that course imperative.*' " (Emphasis added.)
>
> *Chimel v. California, supra* at 761.

Similarly, the Court noted:

> "Only last Term in Terry v. Ohio, 392 U.S. 1, we emphasized that 'the police must, *whenever practicable,* obtain advance judicial approval of searches and seizures through the warrant procedure,' . . . and that '[*t*]*he scope of* [*a*] *search must*

> *be strictly tied to and justified by the circumstances* which rendered its initiation permissible.'" (Emphasis added.) *Supra* at 762.

The Court's new rule was intended to preclude arresting officers from "*routinely* searching rooms other than that in which an arrest occurs." (Emphasis added.) *Supra* at 763. The Court "[saw] no reason why, *simply* because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should *automatically* be allowed despite the absence of a warrant." (Emphasis added.) *Supra* at 767 (n.12).

Mr. Justice White, joined by Mr. Justice Black, observed in the *Chimel* case:

> "The Court has always held, and does not today deny, that when there is probable cause to search and it is 'impracticable' for one reason or another to get a search warrant, then a warrantless search may be reasonable." *Supra* at 773 (dissenting opinion).

Applying these principles to the search before it, the Court in *Chimel* saw "no constitutional justification" for a warrantless search extending beyond the reach of the suspect. *Supra* at 768. As disclosed by the opinion of the California Supreme Court in the *Chimel* case, for several weeks prior to his arrest and the search of his house, the defendant was considered the prime suspect by the arresting officer and there was therefore ample time to obtain a search warrant. *People v. Chimel,* 68 Cal. 2d 436, 438-39 (1968) [439 P.2d 333, 334-35]. A warrant for the defendant's arrest was obtained in *Chimel* (and was not executed for several hours),

and presumably a search warrant could easily have been obtained and executed at the same time. *Chimel v. California,* 395 U.S. 752, 767 (n.13). Furthermore, the search in *Chimel* extended "through the entire three-bedroom house, including the attic, the garage, and a small workshop." *Supra* at 754.

All of the foregoing circumstances present in *Chimel* contrast markedly with the situation confronting the arresting officers in the present case.

The robbers left the Georgiade residence at approximately 10:30 p.m. on June 4, 1966. (R. 30.) It was only during the six or seven hours preceding the arrest of Miller that Sergeant Gastaldo accumulated the information which gave him probable cause for the arrest. (R. 61.) Sergeant Gastaldo learned of Baum's and Bader's arrest and of the fact that a radio stolen from the Georgiades was found inside the vehicle driven by the two men at the time of their arrest. (R. 36-37.) The officer checked with Mr. Georgiade as to the ownership of the radio. (R. 56.) He also checked field interrogation cards which provided information concerning Baum and Bader and their association with petitioner. (R. 38-39, 54-55.) Sergeant Gastaldo also conferred with another officer concerning petitioner, and made a check as to the vehicle owned by petitioner. (R. 55.) And at 5:30 p.m. that same day, Sergeant Gastaldo had a conversation with Baum and Bader in which they implicated petitioner in the Georgiade robbery and informed the officer that the guns and the stolen property connected with that robbery could be found at petitioner's apartment at a specified address. (R. 37, 39, 56.) It was approximately 8:15 that evening when the officers knocked at petitioner's door and were confronted by Miller. (R. 56.)

Thus the arrest and search in the present case were made less than 48 hours after the commission of the offense and apparently only a couple of hours after the arresting officers obtained from their investigation sufficient information constituting probable cause for the arrest. They obtained this information in the early evening hours, after regular court hours, and would have had to wait well over twelve hours to obtain a search warrant.

The officers knew that there was a fourth participant, in addition to petitioner and the two men in custody, involved in the Georgiade robbery. (R. 53.) The members of the gang were known to have committed several other robberies in the area (R. 55), to be very dangerous, as evidenced by the vicious and unprovoked assault on Mr. Georgiade (R. 11-13, 24), and to be armed with guns. (R. 55.) The fourth participant, one Baca, was still at large and in fact was later arrested by Sergeant Gastaldo at a print shop twenty-four hours after Miller's arrest. (R. 36, 41-42.) Baum and Bader had told the officers that "the guns used in the robbery" and "the remaining property" from the Georgiade robbery were at petitioner's apartment. (R. 56.)

Thus the officers were confronted with what was very close to a "hot pursuit" situation. *See Warden v. Hayden*, 387 U.S. 294, 298-300. They had three very good reasons for not delaying petitioner's arrest until the next morning when they could secure a search warrant for the search of petitioner's apartment.

First, petitioner and Baca, armed and dangerous men, were at large and could well be engaged in commiting other assaults and robberies. Secondly, Baum's and Bader's arrests might alert petitioner to flee from his

apartment and possibly from the jurisdiction. And thirdly, if petitioner were arrested that evening and the search delayed until the next day when a search warrant could be procured, Baca, perhaps alerted by petitioner's (and Baum's and Bader's) arrests and realizing that the arresting officers might have observed incriminating evidence while arresting petitioner, might remove the weapons, the disguises, and the stolen property from petitioner's apartment. In this context it is significant that Baum and Bader apparently indicated that *both* guns and *all* the remaining property were at petitioner's apartment. (R. 56.) This supports the inference that Baca (like Miller) probably had access to petitioner's apartment, even in petitioner's absence.

In short, this was not a case where the arresting officers were "routinely" or "automatically" dispensing with the necessity of obtaining a search warrant. *Chimel v. California,* 395 U.S. 752, 763, 767 (n.12). Instead it was not "reasonably practicable" that a search warrant be obtained, and the "exigencies of the situation" made it imperative that petitioner be arrested forthwith and his apartment searched incident thereto and without delay. *Supra* at 758, 759.

Respondent submits that the arresting officers had a duty to act expeditiously under the circumstances confronting them on the evening of June 6, 1966, and not to delay the arrest and search to the next day.

> "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential. . . ."
>
> *Warden v. Hayden,* 387 U.S. 294, 298-99.

III

The New Rule Announced in Chimel, Invalidating Procedures Expressly Sanctioned by Several Decisions of This Court, Should Be Applied Only to Cases in Which the Search Took Place After the Date of That Decision

Although it is respondent's position that the validity of the present search and seizure can readily be sustained under the new rule announced in *Chimel v. California*, 395 U.S. 752, it is urged that the Court reject petitioner's argument that *Chimel* should be given retroactive application to the case at bar.

> ". . . [T]he retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. . . ."
>
> *Johnson v. New Jersey*, 384 U.S. 719, 728.

Thus, the decision in *Mapp v. Ohio*, 367 U.S. 643, extending the exclusionary rule to the states, was denied fully retroactive application to defendants whose convictions were final but was not denied retroactive application to defendants whose convictions were still pending on direct appeal, *Linkletter v. Walker*, 381 U.S. 618, 622, 639-40, while the decision in *Katz v. United States*, 389 U.S. 347, involving another facet of the same Amendment to the Constitution, was confined to searches conducted after the date of *Katz*. *Desist v. United States*, 394 U.S. 244, 254.

As was stated in *Desist,* the Court has viewed the retroactivity or nonretroactivity of decisions expounding new constitutional rules affecting criminal trials "as a function of three considerations."

> "As we most recently summarized them in Stovall v. Denno, 388 U.S. 293, 297, 'The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.' "

Desist v. United States, 394 U.S. 244, 249.

In two *per curiam* decisions which came down the same day as the *Chimel* opinion, the Court expressly left for a later day the question whether *Chimel* should be given retroactive application, since in neither case did the record before the Court require resolution of that issue.

Shipley v. California, 395 U.S. 818, 819;

Von Cleef v. New Jersey, 395 U.S. 814, 815.

In the five months' interim between the decision in *Chimel* and the preparation of this brief, the following decisions passing upon this point have come to respondent's attention.

Five Circuits of the United States Court of Appeals have discussed the issue of *Chimel's* retroactivity in their opinions. The Second Circuit and the Fifth Circuit decided that *Chimel* was applicable only to searches conducted after the date of that decision.

United States v. Charles T. Bennett, et al., ... F. 2d ..... (2d Cir., No. 214-216, decided September 9, 1969, on petition for rehearing [summarized in 6 Crim. L. Rptr. 2016];[11]

Winfield H. Lyon, Jr. v. United States, ... F. 2d ..... (5th Cir., No. 26190, decided September 4, 1969) [summarized in 6 Crim. L. Rptr. 2055].

Opinions of three of the Federal Circuits have discussed the question but held that the cases before them did not require its resolution.

Colosimo v. Perini, 415 F.2d 804, 806 (6th Cir. 1969);

Allen Levair Jordan et al. v. United States, ... F.2d ..... (9th Cir., No. 22,668, decided September 15, 1969) [summarized in 6 Crim. L. Rptr. 2061-62];

United States v. Danny Baca et al., ... F.2d ..... (10th Cir., Nos. 112-69, 113-69, decided September 30, 1969) [summarized in 6 Crim. L. Rptr. 2084-85].

The California Supreme Court has limited the application of *Chimel* to cases in which the search was conducted after the date of that decision. *People v. Edwards*, 71 A.C. 1141, 1152-55 (1969) [458 P.2d 713, 720-21].[12]

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[11]An earlier decision, *Maynard Prater etc. v. Mancusi*, ... F. Supp. .... (S.D. N.Y., No. 69 Civ. 1999, decided July 21, 1969) [summarized in 5 Crim. L. Rptr. 2365], reaches the same conclusion.

[12]Reported decisions of three other states on this question have come to respondent's attention. The Maryland Court of Special Appeals came to the same conclusion as the California Supreme Court. *Scott v. State*, 256 A.2d 384, 389-92 (Md. 1969).

Respondent submits that application of the three fundamental criteria reiterated in *Desist* compel the conclusion that *Chimel* should be applied only to cases in which the search was conducted after the date of that decision (June 23, 1969).

The "purpose to be served by the new standards" clearly favors prospective application since the Fourth "Amendment is designed to prevent, not simply to redress, unlawful police action." *Chimel v. California*, 395 U.S. 752, 766 (n. 12).

> "'[A]ll of the cases . . . requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action. . . . We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police . . . has already occurred and will not be corrected by releasing the prisoners involved.' [Citation.]
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> "We further observed that, in contrast with decisions which had been accorded retroactive effect, 'there is no likelihood of unreliability or coercion present in a search-and-seizure case; the exclusionary rule is but a 'procedural weapon that has no bearing on guilt,' and 'the fairness of the trial is not under attack.'" (Footnotes omitted.)
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> *Desist v. United States*, 394 U.S. 244, 249-50, quoting *Linkletter v. Walker*, 381 U.S. 618, 636-37, 638-39.

A decision of the New Mexico Court of Appeals has applied *Chimel* to a pending appeal without any mention of the question of retroactivity. *State v. Thomas Jefferson Rhodes*, ... P.2d .... (No. 298, decided August 1, 1969) [summarized in 5 Crim. L. Rptr. 2366]. The Alaska Supreme Court has decided to apply *Chimel* to all cases pending on direct review before that court. *Fresneda v. State*, 458 P.2d 134, 143 (n.28) (Alaska, 1969).

In *Fuller v. Alaska,* 393 U.S. 80, the same principles were applied in an analogous area (evidence obtained in violation of section 605 of the Federal Communications Act) to give only prospective application to the exclusionary rule announced in *Lee v. Florida,* 392 U.S. 378.

Lest it seem inconsistent that, in *Linkletter, Mapp* was given partially retroactive application to all cases pending on direct appeal, it is noted that the

> ". . . holdings in Linkletter and Tehan were necessarily limited to convictions which had become final by the time Mapp and Griffin were rendered. Decisions prior to Linkletter and Tehan had already established *without discussion* that Mapp and Griffin applied to cases still on direct appeal at the time they were announced." (Emphasis added.)
>
> *Johnson v. New Jersey,* 384 U.S. 719, 732.
>
> *See also Linkletter v. Walker,* 381 U.S. 618, 622.

In the present case, however, the possibility of applying *Chimel* prospectively is ". . . yet an open issue."

> *Johnson v. New Jersey, supra* at 732.

The "extent of the reliance by law enforcement authorities on the old standards" and the "effect on the administration of justice of a retroactive application" militate strongly against application of the new rule announced in *Chimel* to any search conducted prior to June 23, 1969.

The holding of *United States v. Rabinowitz,* 339 U.S. 56, 65-66, decided in 1950, that "searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search

warrant, for the warrant is not required," was cited by this Court with approval as recently as 1967 (the year after the search in the present case took place). *Cooper v. California,* 386 U.S. 58, 62. *See also Ker v. California,* 374 U.S. 23, 41. As recently as 12 months prior to the decision in *Chimel,* one of the majority in that case cited *Rabinowitz* for the proposition that "an officer arresting on probable cause is entitled to make a very full incidental search."

> *Sibron v. New York,* 392 U.S. 40, 77 (concurring opinion of Mr. Justice Harlan).

Although the Court in *Chimel* made the observation that "Rabinowitz and Harris have been the subject of critical commentary for many years and have been relied upon less and less in our own decisions" (footnotes omitted), *Chimel v. California, supra* at 768, this is not to say that the *Chimel* decision should have been anticipated by law enforcement. Clearly "even the most conscientious police department or judge had no reason to doubt the validity" of the *Rabinowitz* rule. *Desist v. United States,* 394 U.S. 244, 266 (n.5) (concurring opinion). The Court noted in *Chimel* that its decisions "bearing upon that question have been far from consistent, as even the most cursory review makes evident." *Supra* at 755. *See also supra* at 765 and n.10, and *supra* at 771-72 (dissenting opinion). The Court stated, "It is time . . . to hold that" *Rabinowitz* and *Harris v. United States,* 331 U.S. 145, "are no longer to be followed." *Chimel v. California, supra* at 768.

In the face of a claim that *Katz v. United States,* 389 U.S. 347, "merely confirmed the previous demise of obsolete decisions," the Court in *Desist v. United States,* 394 U.S. 244, noted that despite growing judicial dissatisfaction with prior case law, the Court had reiterated the old standards and that its holding in *Katz,* even if foreseeable, "was a clear break with the past." *Supra* at 247, 248. Even more so in the present case, there can be no doubt that the new rule announced in *Chimel* represents a radical departure from the current law of search and seizure.

In the *Chimel* case Mr. Justice Harlan prophetically stated, "we do not know the extent to which cities and towns across the Nation are prepared to administer the greatly expanded warrant system which will be required by today's decision." *Chimel v. California,* 395 U.S. 752, 769 (concurring opinion). The burden on law enforcement in having to adjust to the new procedures required by *Chimel* has been severe, and the necessity of retrying the multitude of cases in which convictions were obtained in reliance on *Rabinowitz* and *Harris* would probably bring the machinery of criminal justice to a halt in many populous counties.

See Desist v. United States, 394 U.S. 244, 251-52;
Linkletter v. Walker, 381 U.S. 618, 637-38.

The District Attorney of Los Angeles County, which has a population of over 7,000,000, has estimated that "as many as 90% of the cases scheduled for trial could be affected in some way" by the Court's decision in

Chimel. He added "that if the ruling is made retroactive it could cause an unprecedented, massive log jam in trial courts."

The Los Angeles Times, June 25, 1969, p. 3.

The fact that, in the short time in which respondent's Petition for Rehearing in *Chimel* could be filed, 70% of the States joined in requesting that the Court's decision be reconsidered points out the impact of the decision on the current state of the law.

The Los Angeles Municipal Court, as well as some of the other courts in Los Angeles County, has placed judges on call at home during nights and weekends, specifically because of the *Chimel* decision, in order to be available to issue search warrants.[13]

Respondent submits that the three fundamental criteria which have guided this Court in deciding whether a new rule of constitutional law is to be given retroactive application compel the conclusion that the new principles announced in *Chimel v. California,* 395 U.S. 752, should be applied only to searches conducted after June 23, 1969, and therefore not to the search involved in the present case. Retroactive application of *Chimel* would not serve to further the purposes set forth in that opinion and would only needlessly punish law enforcement for its justified belief that it could rely on this Court's prior decisions defining the scope of permissible search incident to arrest.

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[13]Memorandum dated July 16, 1969, from the Presiding Judge to all judges of the Los Angeles Municipal Court.

Conclusion

For the foregoing reasons respondent State of California submits that the search of petitioner's apartment was lawful and the fruits of that search properly admitted at petitioner's trial. It is therefore urged that the judgment of the California Supreme Court upholding petitioner's conviction of two counts of robbery and one count of kidnaping be affirmed as to all counts.

Respectfully submitted,

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